Blurring Lines: How Supplemental Jurisdiction Unknowingly Gave the World Ancillary Personal Jurisdiction

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MANY LAW REVIEW articles begin with a gripping story, a hook, to grab the reader's attention and enflame their emotions. The idea is to make the reader understand, from the beginning, why the article is important by putting a human face, some real consequence, to the legal issues that they are discussing. This Comment has no such gripping story. It is aimed at a small group of attorneys who are litigating or anticipate litigating an interpleader action. As a result, this Comment seeks not to enflame emotions, but to engage in a very practical, grounded dialogue to assist those attorneys.

An informal poll of practicing attorneys will likely uncover that most have only a vague recollection of interpleader actions from their first-year civil procedure class. A fairly esoteric procedural device, very few attorneys have had to actually litigate an interpleader action. This Comment focuses on a very specific and even more esoteric inquiry: Can a district court hearing a statutory interpleader action subject an interpleaded defendant to personal liability from a co-defendant's cross-claim despite the fact that that defendant would not ordinarily be amenable to suit in that court on a kind of "well, they're already here" approach to personal jurisdiction? This Comment will conclude that the answer should be no, although some courts appear to think otherwise. And for those who are still with me, this is the gripping story, the consequence of this Comment: federal courts are utilizing an impermissibly lax, discretionary standard with regard to the rigid strictures of personal jurisdiction.

Section 2361 of the interpleader statute[1] authorizes federal district courts to exercise personal jurisdiction over interpleaded defend-

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1. 28 U.S.C. §§ 1335, 2361 (2003).

ants via nationwide service of process. This Comment will provide arguments for lawyers with clients over whom personal jurisdiction has first been exercised for purposes of completely resolving the interpleader action by virtue of section 2361 and who have been secondarily subjected to personal jurisdiction, and placed in danger of personal liability, in a factually related cross-claim by virtue of the misleadingly named doctrine, "supplemental personal jurisdiction."

This Comment begins with an overview of the underlying concepts in civil procedure. First, the Comment will provide a refresher in interpleader actions, their nature, and their underlying *raison d'etre.* Second, the Comment will introduce a relatively unknown doctrine in the federal courts—supplemental personal jurisdiction[2]—a doctrine that grew out of, yet substantially expanded, the better known doctrine of supplemental subject matter jurisdiction. Next, Part II will consider the underlying problem, the exercise of supplemental personal jurisdiction over cross-claims filed by co-defendants in interpleader actions. As will be discussed, there are two primary justifications courts have used to exercise personal jurisdiction in such cases. Finally, Part III will argue why both justifications are inherently flawed and why supplemental personal jurisdiction should not be upheld by courts in interpleader actions.

I. Background

A. Statutory Interpleader Actions[3]

As noted, this Comment focuses on a fairly unusual type of federal action. Title 28, section 1335, of the United States Code creates

2. It is important to note here the definition of terms that will be used with some apparent interchangeability. Supplemental jurisdiction, under the supplemental jurisdiction statute, 28 U.S.C. § 1367 (2003), combined the two common law doctrines of pendent and ancillary jurisdiction. Pendent jurisdiction gave a plaintiff the right to assert transactionally related state and federal law claims in the same case. Ancillary jurisdiction, alternatively, was a defendant's tool that allowed the district courts to hear a defendant's third party claim under state law as ancillary to the transactionally related federal question claim brought against her. *See* 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1444 n.41 (2d ed. 1990) [hereinafter 6 WRIGHT ET AL., SECOND EDITION]. Similarly, as will be shown, by virtue of this statutory combination in the context of subject matter jurisdiction, the more limited doctrine of what was known as "pendent personal jurisdiction" was expanded to include should be called "ancillary personal jurisdiction" under the inclusive title "supplemental personal jurisdiction."

3. There is another type of federal interpleader, "rule interpleader," that derives from Rule 22 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 22. This type of interpleader, however, is not within the scope of this jurisdictional concern because nationwide service of process is only authorized in the case of statutory interpleader

original jurisdiction in the district courts for actions filed "in the nature of interpleader," wherein there is a contested fund held by the filing party (the interpleader plaintiff) in excess of five hundred dollars, and where the fund is subject to two or more adverse claims by parties of diverse citizenship from one another (the claimant-defendants).[4] In other words, three requirements must be met before an interpleader action may be brought in a district court. First, one party must hold a "fund" exceeding a value of five hundred dollars. Second, there must be two or more other individuals who claim a right, adverse to one another's claims, to some or all of that fund. Finally, the fund-holder, the plaintiff, rather than staking any remaining personal claim to the fund, must place the fund in the keeping of the court and force the putative claimants to litigate their respective rights to the fund amongst each other in a single forum.

The primary motivation for the existence of this action is the interests of the stakeholder.[5] The stakeholder protects herself by ensuring, through operation of res judicata, against multiple liability on claims to the fund that might result if each putative claimant were to litigate her own respective claim in a separate forum. Such multiple litigation could lead to inconsistent results and, in turn, to multiple liability exceeding the sum of the fund. To place this in a factual context, imagine a car accident in which a single driver causes damage to multiple vehicles. The driver's insurance company holds a limited fund, that is, the liability limit on the driver's policy. The insurance company should only be forced to pay an amount equal to, or less than, that amount. However, if each owner of the damaged vehicles were to litigate against the insurance company separately, the different courts might each award a portion of that fund such that, taken together, the awards could exceed the value of the policy. In recognizing that it will have to pay the entire sum of the policy, the insurance company in an interpleader action can deposit the fund with a district court and force the claimants to litigate their adverse claims amongst each other in that single forum, ensuring consistent judgments and precluding liability in excess of the policy limits.

actions and is not available in so-called "rule interpleader" actions. *See* 28 U.S.C. § 2361 (2003).

4. 28 U.S.C. § 1335 (2003).

5. 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1702 (3d ed. 2001) [hereinafter WRIGHT ET AL., THIRD EDITION].

Nationwide service of process is authorized in statutory interpleader actions.[6] Generally, federal courts may only exercise jurisdiction over the person of defendants who would be subject to personal jurisdiction in the courts of the state in which the district court sits.[7] However, the person of a defendant may also be subject to the jurisdiction of the court in interpleader cases and where a federal statute authorizes.[8] These statutory authorizations are commonly known as nationwide service of process. In interpleader actions, this nationwide service of process furthers the goal of protecting the stakeholder from multiple, inconsistent liabilities. If claimants could avoid being forced to litigate their claim to the fund in the interpleader action by claiming not to be subject to personal jurisdiction, and therefore not amenable to suit, in the forum in which the action was brought, the protection afforded the stakeholder would be minimal to non-existent.[9] Consequently, the provision for nationwide service of process ensures the protection of the stakeholder by ensuring that all claimants will be amenable to process in the interpleader court and, as such, will be bound by the findings of that court.

B. Supplemental Personal Jurisdiction

The true beginning of the doctrine of supplemental personal jurisdiction is, oddly, the leading case in pendent subject matter jurisdiction, *United Mine Workers v. Gibbs*.[10] Recall that the United States Constitution[11] and congressional statutes grant federal courts subject matter jurisdiction, that is, authorize federal courts to hear cases involving so-called federal questions, suits arising out of the Constitution or federal laws,[12] and so-called diversity cases, in which the parties are residents of different states.[13] Nonetheless, federal courts have long adjudicated state law claims that are factually related to federal question claims under the equitable doctrine of pendent subject matter jurisdiction. *Gibbs* involved a suit against a trade-union for secondary boycott and interference with employment and haulage

6. *See* 28 U.S.C. § 2361 (2003).
7. FED. R. CIV. P. 4(k)(1)(A).
8. FED. R. CIV. P. 4(k)(1)(C)–(D).
9. Note that because statutory interpleader actions are directed at actions in which the claimant-defendants are residents of different states, without nationwide service of process, there would often be at least one defendant who would not be subject to the jurisdiction of the interpleader court. *See* 28 U.S.C. § 2361 (2003).
10. 383 U.S. 715, 725 (1966).
11. U.S. CONST. art. III, § 2.
12. *See* 28 U.S.C. § 1331 (2003).
13. *See* 28 U.S.C. § 1332 (2003).

contracts.[14] After a mining company awarded jobs to members of a rival union, the United Mine Workers forcibly closed the mine and committed various acts of actual and threatened violence against the mine operators and members of the rival union.[15] As a consequence of the United Mine Worker's actions, the plaintiff, Paul Gibbs, lost his haulage contract with the mine in question and, allegedly, began losing business with other mines in the area.[16] Gibbs sued the United Mine Workers under both the Labor Management Relations Act[17] and Tennessee contract law.[18] Because the court's jurisdiction over the case was predicated on the federal law claim, the Supreme Court felt that a threshold question to the determination of the state law claim was properly before the district court.[19] The Supreme Court fleshed out the common law doctrine of pendent subject matter jurisdiction, allowing district courts to exercise subject matter jurisdiction over state law claims arising out of "a common nucleus of operative fact" such that "without regard to their federal or state character . . . [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding."[20] The Court relied on the congressionally expressed interest in "entertaining the broadest possible scope of action consistent with fairness to the parties" inherent in the adoption of the Federal Rules of Civil Procedure,[21] holding that the doctrine's "justification lies in considerations of judicial economy, convenience and fairness to litigants."[22] In *Gibbs,* the Supreme Court dealt exclusively with the constitutional power of the federal courts to hear pendent state law claims and did not address personal jurisdiction. Nonetheless, this justification for the doctrine has led the circuit courts faced with this issue to conclude that the same rationale applies to the exercise of personal jurisdiction.[23]

By way of introduction, the doctrine of supplemental personal jurisdiction simply stated is that "where a federal statute authorizes nationwide service of process, and the federal and state claims derive from a common nucleus of operative fact, the district court may assert

14. *See Gibbs,* 383 U.S. at 720.
15. *Id.* at 718–19.
16. *Id.* at 720.
17. Labor Management Relations Act of 1947 § 303, 29 U.S.C. § 187 (1947).
18. *See Gibbs,* 383 U.S. at 717–18.
19. *Id.* at 721.
20. *Id.* at 725.
21. *Id.* at 724.
22. *Id.* at 726.
23. *See* Robinson v. Penn Cent. Co., 484 F.2d 553, 555–56 (3d Cir. 1973).

personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available."[24] It is important to note that there is neither a federal statute nor a Supreme Court decision expressly authorizing the exercise of supplemental personal jurisdiction. There have been suggestions that the entire doctrine is flawed,[25] but for the purposes of intelligible and limited discussion, this Comment will accept the approval of the Second, Third, Fourth, and D.C. Circuit Courts of Appeal, each of which has upheld the doctrine, and will operate under the assumption that, as applied to strictly to "pendent claims," the doctrine is viable.

The earliest appellate court to affirmatively expand on the *Gibbs* principles and exercise pendent personal jurisdiction was the Third Circuit in *Robinson v. Penn Central Co.*[26] In *Robinson*, the court held that the exercise of personal jurisdiction over state claims arising from the same transaction giving rise to a Securities and Exchange Act claim (authorizing extra-territorial service of process) was within the court's discretion.[27] The court started with dicta from *Schwartz v. Eaton*,[28] wherein the Second Circuit, though dismissing an appeal as interlocutory, nevertheless stated that the exercise of personal jurisdiction over the defendant from service of process authorized under the Investment Company Act would have been proper over pendent state law claims.[29] The court reasoned that the statute had already authorized the district court to "extend their writ extra-territorially" and, since the defendant was properly before the court for purposes of judgment, it mattered little how he got there.[30] The *Robinson* court reasoned further that, from this perspective, the question was not one of in personam jurisdiction, but simply a matter of applying pendent subject matter jurisdiction to the transactionally related state claims.[31] Following *United Mine Workers v. Gibbs*, the court held that it should look to "considerations of judicial economy, convenience and

24. Iron Workers Local No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 796, 805 (N.D. Ohio 1998).

25. *See* Jason A. Yonan, *An End to Judicial Overreaching in Nationwide Service of Process Cases: Statutory Authorization to Bring Supplemental Personal Jurisdiction Within Federal Courts' Powers*, 2002 U. ILL. L. REV. 557.

26. *See Robinson*, 484 F.2d at 553.

27. *Id.* at 555–56.

28. 264 F.2d 195, 197–98 (1959).

29. *See Robinson*, 484 F.2d at 555.

30. *Id.*

31. *Id.*

fairness to litigants" and exercise its discretionary authority to hear the state law claims.[32]

The next major decision authorizing the exercise of personal jurisdiction over a defendant on the basis of pendent jurisdiction was *Oetker v. Werke.*[33] In *Oetker,* the court stated that the plaintiff could rightly exercise personal jurisdiction by virtue of nationwide service of process authorized by federal patent law. This enabled the plaintiff to obtain personal jurisdiction over a defendant with regard to all claims arising out of the same core of operative facts.[34] The court based this holding first and foremost on the *Gibbs* decision and then cited, without further comment, to a list of prior decisions approving the exercise of pendent personal jurisdiction, beginning with the *Robinson* case and followed by several lower court decisions, as well as the approval of legal scholars.[35]

Before analyzing more recent cases on the subject, it is important to discuss the codification of pendent (and ancillary) subject matter jurisdiction in the so-called "supplemental jurisdiction statute."[36] The statute authorizes a district court with original jurisdiction over a claim, unless that jurisdiction arises from diversity, to exercise "supplemental jurisdiction" over all other claims that form the same "case or controversy under Article III of the United States Constitution."[37] That authorization maintains the common law discretion of the courts to deny jurisdiction under equitable principles such as the complexity of a state law question or the predominance of the state law claim over the federal claim.[38] Section 1367 essentially codifies the common law doctrines of pendent and ancillary personal jurisdiction into the unified "supplemental jurisdiction."[39] Pendent jurisdiction, as already noted, gives the plaintiff the right to assert transactionally related state law claims in the same case. Alternatively, ancillary jurisdiction is a defendant's tool that allows the district courts to hear a defendant's state law-based third party claim in the original action.[40] While Congress was comfortable combining these two doctrines in the subject

32. *Id.* at 555–56.

33. 556 F.2d 1 (D.C. Cir. 1977).

34. *Id.* at 4.

35. *Id.* at 4–5.

36. 28 U.S.C. § 1367 (2003).

37. *Id.* § 1367(a).

38. *See id.* § 1367(c).

39. *See, e.g.,* Cami Rae Baker, *The Codification of Pendent and Ancillary Jurisdiction: Supplemental Jurisdiction,* 27 TULSA L.J. 247 (1991).

40. 6 WRIGHT ET AL., SECOND EDITION, *supra* note 2, § 1444.

matter context, as we shall see, despite several district courts' temptations to do so, the concepts of pendent and ancillary jurisdiction do not mix quite so comfortably in the context of personal jurisdiction.

Returning to the development of pendent personal jurisdiction, further decisions have been largely without comment or further illumination. In *IUE AFL-CIO Pension Fund v. Herrmann*,[41] the Second Circuit, relying largely on the rationale of *Gibbs*, its progeny, and the aforementioned pendent personal jurisdiction authorities, held that where a federal statute has authorized nationwide service of process and where the federal and state law claims derive from a "common nucleus of operative fact," a district court may assert personal jurisdiction over the parties to the related state law claims "even if personal jurisdiction is not otherwise available."[42] It is worth noting that this decision, and those that precede it, arose out of the doctrine of pendent jurisdiction as authorized by the Supreme Court in *Gibbs*. The *Herrmann* court specifically discusses this source as the governing standard, as opposed to the supplemental jurisdiction statute,[43] because the statute had not yet come into force when the *Herrmann* action began.[44] The Second Circuit, however, sets up the reliance of lower courts on the supplemental jurisdiction statute through dicta stating, "In any event, an analysis under section 1367(a) would not alter our analysis."[45]

Following suit, in *ESAB Group, Inc. v. Centricut, Inc.*,[46] the Fourth Circuit expressly approved the exercise of pendent personal jurisdiction, citing the aforementioned authorities and stating that, "[i]n recognizing pendent personal jurisdiction, we join the other circuits that have done so."[47] The Fourth Circuit also appears to rely primarily on *Gibbs*, but impliedly adds to the appearance of section 1367 authorization (begun by the Second Circuit) by following its discussion of *Gibbs* with the statement, "The [pendent jurisdiction] doctrine has since been codified at 28 U.S.C. § 1367."[48] This statement appears to indicate that justifications based on *Gibbs* were equally supported by section 1367. Finally, numerous district courts have begun to exercise pendent personal jurisdiction on the basis of section 1367, referring

41. 9 F.3d 1049 (2d Cir. 1993).
42. *Id.* at 1056.
43. *See* 28 U.S.C. § 1367.
44. *See Hermann*, 9 F.3d at 1052 n.2.
45. *Id.* at 1052.
46. 126 F.3d 617 (4th Cir. 1997).
47. *Id.* at 628.
48. *Id.*

to it as "supplemental personal jurisdiction."[49] It is important to emphasize this apparent connection between pendent personal jurisdiction and section 1367 because, as will soon become clear, this connection drawn by the Second and Fourth Circuits led lower courts to apply supplemental personal jurisdiction to cross-claims in statutory interpleader cases.

II. District Courts Extend Supplemental Personal Jurisdiction to Cross-Claim Defendants in Statutory Interpleader

There are presently only two applications of ancillary personal jurisdiction;[50] namely, statutory interpleader and bankruptcy actions. This Comment will not address the application of ancillary personal jurisdiction in bankruptcy actions because there appears to be statutory authority for exercising ancillary personal jurisdiction in bankruptcy cases.[51] Because this Comment deals with the narrow question of ancillary personal jurisdiction in interpleader actions, and because that exercise is not expressly authorized by statute, discussion of jurisdiction in bankruptcy cases, where it is expressly authorized, is largely irrelevant. It may, however, be worth briefly noting this express authorization. It is clear that Congress is capable of authorizing courts to exercise personal jurisdiction over parties for whom nationwide service of process is authorized to force potential plaintiffs to litigate their claims in one court. As a result, it may be appropriate to assume that Congress's failure to authorize ancillary personal jurisdiction in section 2361 indicates their intent that such jurisdiction not be authorized.

There are currently three cases upholding the exercise of ancillary or supplemental personal jurisdiction in cross-claims by claimant-defendants in statutory interpleader cases.[52] First, in *First Tennessee Na-*

49. *See, e.g.*, Tucker v. Bank One, N.A., 265 F. Supp. 2d 923 (N.D. Ill. 2003).

50. I employ the term "ancillary" here, as opposed to supplemental, to maintain the distinction that has been glossed over by the lower courts between pendent personal jurisdiction and ancillary personal jurisdiction, though both are often now referred to as supplemental jurisdiction. The reader will recall that "ancillary jurisdiction" is exercised over the cross-claims by nominal defendants.

51. *See* 28 U.S.C. § 1334; Harder v. Desert Breezes Master Ass'n., 192 B.R. 47, 51 (N.D.N.Y. 1996).

52. An earlier case, *Bank of Neosho v. Colcord*, 8 F.R.D. 621 (W.D. Mo. 1949), is in conflict with the other earlier cases to be discussed *infra*. In effect it exercised supplemental personal jurisdiction, but it is distinguishable from the present issue in two ways. First, that case dealt with rule interpleader, which does not authorize nationwide service of process. *Id.* at 622. Second, it appears that the cross-claimant defendant submitted voluntarily to the jurisdiction of the court to adjudicate its claim to the fund in question. *Id.* at 624.

tional Bank, Chattanooga v. Federal Deposit Insurance Corp.,[53] the Eastern District Court of Tennessee heard a statutory interpleader case brought by First Tennessee National Bank, Chattanooga in order to determine the ownership of certificates of deposit as between three individuals and the Federal Deposit Insurance Corporation ("FDIC") acting as bankruptcy trustee for Hamilton Mortgage Company, Inc. The individual defendants and the FDIC agreed that the certificates were being held as security on a loan to the defendants.[54] The defendants alleged that Hamilton failed to meet certain conditions precedent to create an effective security interest in the certificates and, further, failed to disburse the funds of the loan.[55] The FDIC alleged that the defendants defaulted on their loan and, therefore, that the certificates belonged to the FDIC, acting as trustee for Hamilton. In addition, the FDIC filed a cross-claim for the balance of the loan.[56] The individual defendants, Atlanta residents, were brought before the court under statutorily authorized service of process under section 2361 and, according to the court, should therefore be "subject to the jurisdiction of this Court only insofar as necessary to decide the question of entitlement to the interpleaded certificates."[57] The court then embarked on a thorough consideration of the question of whether or not application of supplemental personal jurisdiction was appropriate to claims such as the one brought by the FDIC. The court began its careful analysis by examining the still open question (a question that remains open to this day) of whether an interpleader action is one in personam or in rem.[58] The court first determined that, based on pre-

That is substantially different from a party who is brought before the court on nationwide service of process. If allowed to exercise ancillary personal jurisdiction over a party upon nationwide service of process, the defendant could not, upon refusing to appear before the adjudicating court, later contest the court's jurisdiction to render a verdict against him on traditional jurisdictional grounds as he could under rule interpleader. *See* FED. R. CIV. P. 60; Prete v. Lepore, 125 F.R.D. 572 (D. Conn. 1989) (denying Rule 60(b)(4) motion to vacate default judgment as void where statute authorized nationwide service of proess.); *see also* Robinson Eng'g Co. Pension Plan & Trust v. George, 223 F.3d 445 (7th Cir. 2000) (denying Rule 60(b)(4) motion on grounds of lack of personal jurisdiction where statute authorized nationwide service of process on defendant; remanded for determination of adequacy of service).

53. 421 F. Supp. 35 (E.D. Tenn. 1976).

54. *Id.* at 36.

55. *Id.*

56. *Id.* at 37.

57. *Id.*

58. *Id.* Generally, a court exercises in personam jurisdiction over a party when a judgment sought will lie against the individual, that is, where the judgment will result in personal liability against an individual. Alternatively, a court exercises in rem jurisdiction when the judgment lies only with regard to a "res," a piece of property. For more on the

cedent and commentary, the question of whether the action is in rem or in personam is irrelevant in the context of interpleader; only the requirements of due process need to be satisfied in order for jurisdiction to be proper.[59] The court then adopted the "sensible approach" found in the commentaries of Wright and Miller's Federal Practice and Procedure and of Harvard Law Professor, Zechariah Chaffee.[60] These commentators rely on Rule 13(g),[61] allowing the liberal assertion of transactionally related cross-claims against co-parties. Rule 22[62] mandates that all interpleader actions be conducted according to the Rules of Civil Procedure, including Rule 13(g). As a result, they argue that parties are entitled to assert "cross-claim[s] . . . against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action . . . or relating to any property that is the subject matter of the original action."[63] Further, they argue that, because any cross-claims may be asserted arising out of either the same transaction or property that forms the subject matter of the case, there is no need for an answer as to the in personam-in rem question.[64] In addition, they suggest that this rule indicates congressional approval of the broadening of litigation in the interest of judicial economy.[65]

The next court to consider the issue of supplemental personal jurisdiction was the United States District Court for the Southern District of New York. In *Priority Records, Inc. v. Bridgeport Music Inc.*,[66] the court exercised what it referred to as ancillary personal jurisdiction over cross-claims.[67] The plaintiff entered a fund with the court made up of royalties from a catalog of songs by the composer, funk legend George Clinton.[68] The cross-claims were filed by one California record company against another, claiming a right not only to royalties from the catalog held by Priority Records (the interpleader "fund"),

question of in rem and in personam jurisdiction in interpleader actions, see Donald L. Doernberg, *What's Wrong with This Picture?: Rule Interpleader, the Anti-Injunction Act, In Personam Jurisdiction, and M.C. Escher*, 67 U. COLO. L. REV. 551, 574 (1996).

59. *See First Tenn. Nat'l Bank*, 421 F. Supp. at 37–38.

60. *Id.*

61. *See* FED. R. CIV. P. 13(g).

62. *See* FED. R. CIV. P. 22(*1*).

63. FED. R. CIV. P. 13(g).

64. *See First Tenn. Nat'l Bank*, 421 F. Supp. at 38 (citing WRIGHT ET AL., THIRD EDITION, *supra* note 5, § 1711).

65. *Id.*

66. 907 F. Supp. 725 (S.D.N.Y. 1995).

67. *Id.* at 732.

68. *Id.* at 729.

but to the complete listing of Clinton's work.[69] The court exercised ancillary jurisdiction generally, including personal jurisdiction, in consideration of the judicial economy of concluding the matter in one proceeding, as weighed against the relatively low inconvenience to the other claimant-defendant who was already properly before the court under the interpleader statute's nationwide service of process.[70] The district court did not avail itself of the careful consideration undertaken by the Tennessee court in the former discussion. Instead, it relied on the aforementioned approval of commentators calling for a "'sensitive and flexible approach'" to this subject in the interest of judicial economy.[71]

The Court for the Southern District of New York more recently revisited this subject in *Rubinbaum, LLP v. Related Corporate Partners V.*[72] The district court in this case exercised what it now referred to as "supplemental personal jurisdiction" over claimant-defendants, the Brannons, on theories of breach of fiduciary duties, breach of contract, accounting, and declaratory judgments over their alleged failure to see a real estate project through appropriately.[73] The Brannons were claimants to an interpleaded fund composed of the escrow fund for a development property.[74] The court expressly predicated jurisdiction on the combination of the Second Circuit's recent decision in *Herrmann* and the latter enacted supplemental jurisdiction statute.[75] The court referred to the dictum in *Herrmann*, to the effect that analysis under section 1367 would not alter their analysis, and concluded that the statute and prior decisions, including *Priority Records*, authorized the exercise of supplemental personal jurisdiction generally.[76] The court went on to acknowledge that most applications of supplemental personal jurisdiction had been with regard to pendent jurisdiction arising from other statutes, but stated that "[t]here is nothing about the interpleader statute that would preclude the application of supplemental personal jurisdiction in statutory interpleader actions."[77] As in *Priority Records*, the court's analysis concentrated on the desirability of adjudicating claims in one action and the relatively low

69. *Id.* at 730–31.
70. *Id.* at 731.
71. *Id.* at 729. (quoting WRIGHT ET AL., THIRD EDITION, *supra* note 5, § 1715).
72. 154 F. Supp. 2d 481 (S.D.N.Y. 2001).
73. *Id.* at 483, 488.
74. *Id.* at 484.
75. *Id.* at 488.
76. *Id.* at 489–90.
77. *Id.* at 490.

inconvenience to the Brannons, who were already properly before the court.[78]

Admittedly, thus far, the issue of supplemental personal jurisdiction in statutory interpleader actions has arisen in only a few published cases. Nonetheless, it is important to note the approval of commentators and the courts' heavy reliance thereon as a justification for their exercise of jurisdiction when the issue has arisen.[79] This is addressed in order to draw attention to the likelihood that when this admittedly rare and fairly esoteric issue arises again, based on the recent precedents and scholarly approval, courts are likely to continue down this flawed road.

III. Arguments Against the Exercise of Supplemental Personal Jurisdiction in Statutory Interpleader Actions

It is important to understand the justifications that have been employed in explaining this expansion of supplemental personal jurisdiction to cross-claims in statutory interpleader actions. As noted, courts and scholars have principally relied on two justifications for this expansion.

First, they have relied on the perceived extension of pendent personal jurisdiction into supplemental personal jurisdiction, through the supplemental jurisdiction statute, thereby extending pendent personal jurisdiction to what was once known as ancillary personal jurisdiction. The problem with this rationale is that the dominant considerations in pendent personal jurisdiction are not necessarily the dominant considerations in statutory interpleader. The essential difference rests on the distinction between a party sued for personal liability, a defendant in the usual sense, and a "claimant" interpleaded, that is, an individual forced to litigate his claim against the interpleader fund, a plaintiff in the usual sense. This is bolstered by the statutory authorization for nationwide service of process, as well as the nature of interpleader actions as different from almost all other types of actions.

78. *Id.* at 489–490.

79. *See, e.g.*, WRIGHT ET AL., THIRD EDITION, *supra* note 5, § 1715, at 643. ("Certainly nothing in [the interpleader statute] prohibits employing what in effect is a notion of ancillary personal jurisdiction."); Zechariah Chafee, Jr., *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929, 938 (1943).

Second, courts have based this extension on an interpretation of Rule 13(g), supported by many commentators, that the rule[80] should be interpreted broadly as creating personal jurisdiction where convenience, judicial economy, and fairness to the litigants requires it. Rule 13(g) unquestionably governs interpleader actions. However, the problem with this justification is that Rule 13(g) is not a rule of jurisdiction—it is a rule of joinder of claims. This is clear from the face of the statute and from the limitations on its scope generally. This has also been noted by the Ninth Circuit in a now largely lost opinion[81]—Rule 13 is a rule governing the conduct of civil actions, not creating personal jurisdiction.

A. Faulty Reliance Upon Supplemental Personal Jurisdiction

The first difficulty in applying supplemental personal jurisdiction, as the District Court for the Southern District of New York has done by relying on what is actually pendent personal jurisdiction precedent, is that the exercise of what is really ancillary personal jurisdiction is different than the exercise of pendent personal jurisdiction. The problem is that, as suggested earlier, courts have assumed that the analysis of pendent personal jurisdiction doesn't change under the lately adopted supplemental jurisdiction statute. This assumption, however, blurs an important distinction between pendent and ancillary jurisdiction in the context of personal jurisdiction.

As noted earlier, the first court to apply what later became known as pendent personal jurisdiction, *Robinson*, did not consider the question as one of personal jurisdiction.[82] Because the defendant in the case was already present before the court, the court made the decision, based on *Gibbs*, to extend the subject matter of the case to the transactionally related state claims.[83] This approach highlights the difference between pendent jurisdiction and ancillary personal jurisdiction. The defendant in *Robinson* was brought before the court by nationwide service of process where he could be subjected to personal liability. The court merely extended the defendant's exposure to personal liability to related state law claims, something clearly envisioned by *Gibbs*. Alternatively, the claimant-defendant in an interpleader ac-

80. FED. R. CIV. P. 22(2) (stating that actions under section 1335 shall be conducted in accordance with the Federal Rules of Civil Procedure).

81. *See* Hagan v. Central Ave. Dairy, 180 F.2d 502, 504 (9th Cir. 1950).

82. *But cf.* Robinson v. Penn Cent. Co., 484 F.2d 553, 555 (3d Cir. 1973) ("The issue is not one of territorial in personam jurisdiction—that has already been answered by [the Securities Exchange Act of 1934]—but of subject-matter jurisdiction.").

83. *Id.*

tion is not a defendant in the classic sense (that is, one who has allegedly violated a law to the detriment of another and who is subjected to personal liability for that detriment) but is a perceived potential plaintiff in an action that will, because of the unilateral act of the plaintiff stakeholder, never happen. Thus, the claimant-defendant is exposed to no personal liability by the court's exercise of nationwide service of process.

Take the classic example of an interpleader action: a mass tort wherein the tortfeasor is the holder of an indemnity insurance policy. In such a case, the insurance company places the fund—here, the total value of the policy—into the court and forces the victims of the tort, or the potential claimants perceived by the insurance company, to stake their claim to that fund in one action. In this sense, the insurance company is not suing the defendants for some legally stipulated wrong done to them, but rather effectively forcing those parties to sue them in one place and at one time. Alternatively, once a co-defendant is permitted to assert a cross-claim against the claimant-defendant, that claimant ceases to be merely a putative plaintiff and becomes a defendant in the usual sense; she is forced to defend against claims for personal liability. This is really the first time that the court extends its jurisdiction over the person of the defendant because it is the first time that the defendant is exposed to personal liability and will be compelled to defend a claim against her. In a very real sense, a new party has been brought before the court. Before the cross-claim, the court exercised jurisdiction over a claimant. After the cross-claim, the court exercises jurisdiction over the person of a defendant, subjecting her to personal liability. This is more than merely adding subject matter to the case, as in *Robinson* and as envisioned by *Gibbs*. This changes the very nature of the claimant's involvement with the action.

Some additional light may be shed on this gut-level understanding of the "claimant-defendant" by looking at the language of the authorization of service of process as compared with other statutes authorizing nationwide service of process. While other examples exist,[84] the primary applications of pendent personal jurisdiction by the appellate courts above have revolved around nationwide service of process authorized by the Securities Exchange Act of 1934[85] and the

84. *See, e.g.*, 4A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069.7 n.9 (3d ed. 2002).

85. Securities Exchange Act of 1934 at tit.15, 15 U.S.C. § 78aa (2003).

Racketeer Influenced and Corrupt Organizations Act ("RICO").[86] As will become clear, these statutes authorize nationwide service of process on "defendants"[87] or "persons,"[88] whereas section 1367 authorizes service on "claimants." While this may appear merely semantic, the distinction goes to the heart of the difference between interpleader and almost all other types of actions.

The Securities Exchange Act of 1934 authorizes nationwide service of process.[89] The statute specifies that

> [a]ny suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.[90]

First, it is important to note the language "in such cases," for it is only "in such cases" that nationwide service of process is authorized. The cases to which that language refers are "[a]ny suit or action to enforce any liability or duty . . . or to enjoin any violation" of this chapter, rules, or regulations.[91] This language is comparatively broad in scope and says nothing more about the nature of the proceeding except that it seeks to enforce the rules of the Act. In fact, this broad notion of what constitutes a "case" is the original basis for pendent jurisdiction. The whole notion arose from the Supreme Court's interpretation of what constitutes a "case" under Article III, section 2.[92] Second, notice that the language of the statute authorizes service on "defendants." "Defendants" in this context can only mean parties sued or subjected to personal liability in "such cases." That is, parties subject to a suit or action to enforce the rules of the Act. Service, therefore, is authorized as against actual or potential violators of the Act "wherever they may be found."[93]

In RICO actions, 18 U.S.C. section 1965(d) authorizes that "process in any action or proceeding under this chapter may be served on

86. Racketeer Influenced and Corrupt Organizations Act at tit. 16, 18 U.S.C. § 1965(d) (2000).

87. 15 U.S.C. § 78aa.

88. 18 U.S.C. § 1965(d).

89. 15 U.S.C. § 78aa.

90. *Id.*

91. *Id.*

92. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (stating that pendent jurisdiction exists when claims are so related to comprise "but one constitutional 'case'").

93. *See id.*

any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."[94] Note again how the statute employs the broad language of "any action or proceeding" and further note that the statute authorizes service on "any person."

The import of both of these statutes is that they authorize, by their language, service of process for actions enforcing the rules of the acts of which they are a part and that they authorize service on the individuals who have broken those rules. In other words, both statutes authorize courts to subject defendants to personal liability in a foreign court.

Compare this with the nationwide service of process for statutory interpleader.[95] The statute states, "In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants . . . ."[96] First, the language "[i]n any civil action of interpleader or in the nature of interpleader" is considerably more limited than the aforementioned examples. Service of process has been authorized for interpleader actions, not "any action" to enforce rights or duties under statutory rules. Second, the language authorizes "process for all claimants." As noted above, the claimant-defendant is not a defendant at all—that is, not a person who is subjected to personal liability by the plaintiff. Instead, the defendant is a possible plaintiff against the fund holder. Hence, the statute authorizes service of process on "claimants" and not on "persons" or "defendants." It is only the individual's claim to the fund that is to be forcibly subjected to the jurisdiction of the court because this is the only issue the plaintiff stakeholder has any interest in resolving. The purpose of the interpleader statute and its nationwide service of process is to allow otherwise disinterested stakeholders to avoid multiplicity of liability. In addition, the language of the statute is tailored in such a way as to indicate this limited purpose. Therefore, it follows naturally that the individuals brought before a foreign court, a court in which they would not otherwise be subject to personal jurisdiction, can only be brought as claimants and cannot be subject to personal liability.[97] The combination of ancillary and pendent jurisdiction into supplemental jurisdiction in the subject matter

94. 18 U.S.C. § 1965(d) (2000).

95. *See* 28 U.S.C. § 2361 (2000).

96. *Id.*

97. Although a basic understanding of the limitations placed on a court's exercise of personal jurisdiction by the Fourteenth Amendment is presumed, it may be worth reminding the reader that it is a violation of due process to subject an individual to personal liability in a court in a forum state with which they do not have purposeful minimum

context has buried this personal liability distinction between the two in the personal jurisdiction context. This has allowed courts to apply the reasoning that justified pendent personal jurisdiction to cases of ancillary personal jurisdiction without really considering whether or not the same justifications are in fact applicable.

Courts adopted this view in a now forgotten line of cases beginning with *Stitzel-Weller Distillery, Inc. v. Norman.*[98] The District Court for the Western District of Kentucky in this early case dealt with an asserted cross-claim in the nature of tort by one claimant-defendant to a fund of warehouse receipts held by the plaintiff over alleged fraud with regard to the sale of those receipts.[99] The defendants in the cross-claims, residents of Ohio and Florida, were served with process subject to the predecessor of section 2361[100] in order to bring them before the interpleader court in Kentucky and then served with notice of the cross-claim against them. The Kentucky court determined that the statute "does not confer jurisdiction over defendants in another state against whom a personal judgment is sought by cross-bill filed by a codefendant. Such a proceeding is not an interpleader proceeding, and in such a proceeding the cross-defendants are not 'claimants' as provided by the statute."[101] This case was followed by a short line of cases[102] and distinguished in others[103] but, regardless, has been largely left behind in contemporary cases.[104] Modern cases have viewed the subsequent development of supplemental personal jurisdiction as superceding this line of cases.[105] Thus, modern courts, in their rush to grant themselves jurisdiction, have assumed that a doctrine governing one type of action is applicable to another. Further, in that rush, courts have rejected soundly reasoned precedents that explained the inherent problem of ancillary personal jurisdiction on the

contacts. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Kulko v. Superior Court, 436 U.S. 84, 94 (1978).

98. 39 F. Supp. 182 (W.D. Ky. 1941).

99. *See id.* at 184–85.

100. 28 U.S.C. § 41(26) (1936).

101. *See, e.g., Stitzel-Weller*, 39 F. Supp. at 188.

102. *See, e.g.*, Hagan v. Central Ave. Dairy, 180 F.2d 502, 504 (9th Cir. 1950).

103. *See, e.g.*, Bank of Neosho v. Colcord, 8 F.R.D. 621, 624 (W.D. Mo. 1949).

104. *But see* Carolina Casualty Ins. Co. v. Mares, 826 F. Supp. 149, 154 (E.D. Va. 1993) (holding that because nationwide service of process is only authorized for actions "of interpleader or in the nature of interpleader," and cross-claims between claimant-defendants going beyond the scope of the interpleaded fund were not in the nature of interpleader, the exercise of jurisdiction over the person of a claimant-defendant for such cross-claims would be an abuse of the interpleader statute).

105. *See* Rubinbaum LLP v. Related Corporate Partners V, L.P., 154 F. Supp. 2d 481, 490 (S.D.N.Y. 2001).

sole grounds that the explanation came before the latter development of the doctrine. That justification is, as has been illustrated, not so easily applicable.

B. The Faulty Expansion of Rule 13(g) and the Court's Equitable Powers

Another approach to justifying the extension of supplemental personal jurisdiction in interpleader cases has been reliance upon Rule 13(g) and commentators who have called for a "flexible approach" under the broad interpretation called for by Rule 13. This flexible approach leads courts to the conclusion that, under discretionary principles generally applied to supplemental subject matter jurisdiction, courts have similar authority to extend personal jurisdiction to ancillary claims. Careful analysis of a now lost line of cases will show the inherent faultiness in extending personal jurisdiction on the basis of considerations of "judicial economy and fairness to the parties."

Rule 13(g) states:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.[106]

Thus, Rule 13(g) allows courts to liberally entertain transactionally related cross-claims amongst co-parties in the interest of resolving the entire controversy without requiring multiple suits.[107] First, it is worth noting that, by its language, this is a rule of pleading, not one of jurisdiction. The reader will notice that the rule says nothing about jurisdiction. One might wonder if jurisdiction is, nonetheless, somehow implicit. Clearly, however, this is not the case. Because Rule 13(g) requires that cross-claims arise out of the "same transaction or occurrence,"[108] they "are subject to basically the same transactional test."[109] Therefore, courts have generally held that Rule 13(g) cross-claims "fall within the ancillary jurisdiction of the court."[110] This is not, however, the rule in all courts.[111] Even though the rule appears to require the same transactional relation that section 1367 requires for the exer-

106. FED. R. CIV. P. 13(g).
107. *See* 6 WRIGHT ET AL., SECOND EDITION, *supra* note 2, § 1431.
108. FED. R. CIV. P. 13(g).
109. 6 WRIGHT ET AL., SECOND EDITION, *supra* note 2, § 1433.
110. *See id.*
111. *See* FED. R. CIV. P. 13(g).

cise of supplemental jurisdiction, the rule, by itself, does not actually confer jurisdiction. If the statute cannot imply subject matter jurisdiction, how can it imply personal jurisdiction? The rule certainly says nothing about personal jurisdiction, nor does it require purposeful minimum contacts as personal jurisdiction requires.[112] If the rule cannot confer subject matter jurisdiction where its own requirements are the same as those of section 1367, how can it confer personal jurisdiction where its requirements do not even approach the rigorous requirements imposed by due process? In addition, statutes authorizing nationwide service of process also fail to mention purposeful minimum contacts. Rule 13(g), however, is different from those statutes in that it is clear that it in no way authorizes the compulsion of appearance by an individual before the court by nationwide service of process. Rather, the rule limits its application to the assertion of cross-claims by "co-parties," other defendants already properly before the court.[113] Clearly then, Congress intended Rule 13(g) to apply only when an individual was already a party, that is, already properly before the court.

Even Wright and Miller recognize that Rule 13(g) cannot be used as a grounds for personal jurisdiction.

> Since Rule 13(g) specifically provides that cross-claims may be asserted only against co-parties, there typically can be no objection to the court's jurisdiction over the person of the cross-claim defendant; he is already before the court for the purposes of defending against the main claim. However, if this is not the case, then any personal jurisdiction objections remain available.[114]

Wright and Miller are amongst those commentators cited as calling for a flexible approach under Rule 13(g) in the exercise of personal jurisdiction in statutory interpleader litigation.[115] Consistent with that argument, they go on to state that "if [the] defendant [in an interpleader action] appears and asserts a right to the fund . . . his appearance waives any objection to personal jurisdiction."[116] But notice that the claimant-defendant has not appeared, in the commenta-

112. 28 U.S.C. § 2361 (2000).

113. A defendant who wishes to assert a cross-claim against a party who is not already before the court must resort to the procedure of FED. R. CIV. P. 14(a), but even Rule 14(a) is limited by territorial rules of personal jurisdiction. 6 WRIGHT ET AL., SECOND EDITION, *supra* note 2, § 1455 ("Requirements of personal jurisdiction and service of process must be satisfied, which means that objections on these grounds are not defeated by the ancillary nature of the proceeding.").

114. 6 WRIGHT ET AL., SECOND EDITION, *supra* note 2, § 1433.

115. *See* WRIGHT ET AL., THIRD EDITION, *supra* note 5, § 1702.

116. 6 WRIGHT ET AL., SECOND EDITION, *supra* note 2, § 1433.

tor's own words, "for the purposes of defending against the main claim." As discussed above, in the usual course, the claimant-defendant is not being asked to defend against personal liability. Therefore, her appearance before the court is limited in a way that almost no other party's appearance in court is limited. In a sense, the claimant-defendant, as an individual, has not "appeared" at all—only her claim has appeared. Such a limited and compelled appearance should not be construed as a waiver of objection.

The Ninth Circuit Court of Appeals also rejected the claim that Rule 13(g) can confer personal jurisdiction in interpleader actions in the now forgotten, or consciously ignored,[117] case of *Hagan v. Central Avenue Dairy, Inc.*[118] In *Hagan,* the Ninth Circuit determined that Rule 13(g) merely governed "the conduct of actions" and could not be used to extend jurisdiction over a party.[119] "There is no use in talking about how an action is to be conducted unless a court has jurisdiction of the person and competency as to the subject matter."[120]

If Rule 13, as is clear from its face and from the decision of the Ninth Circuit, cannot confer personal jurisdiction, then reliance by commentators or courts on Rule 13's liberal interpretation is inapposite. Without personal jurisdiction, the court cannot hear the claim and Rule 13, no matter how broadly read, cannot confer personal jurisdiction.

Conclusion

Though what has come to be known as pendent personal jurisdiction is likely an appropriate exercise of discretionary power by the courts, the subsequent enactment of section 1367, the supplemental jurisdiction statute, does not extend the discretionary power of the court to ancillary personal jurisdiction. Because the exercise of ancillary personal jurisdiction extends possible personal liability to an individual who otherwise could not be subjected to personal liability in that court, the considerations relevant to the exercise of pendent jurisdiction are inapplicable to the exercise of ancillary personal juris-

117. *See* Rubinbaum LLP, v. Related Corporate Partners V, L.P., 154 F. Supp. 2d 481, 490 (S.D.N.Y. 2001) (rejecting an older line of cases on the grounds that they were decided "prior to the more recent decisions in this circuit and elsewhere confirming the existence of supplemental personal jurisdiction").

118. 180 F.2d 502 (9th Cir. 1950).

119. *Id.* at 503.

120. *Id.*

diction. Further, resort to Rule 13(g), a rule of pleading, not of jurisdiction, and of joinder of claims, not of parties, is unavailing.

The solution, then, is clear. Courts must determine that, absent independent bases for the exercise of personal jurisdiction over a cross-claim defendant, courts may not entertain even transactionally related cross-claims by claimant-defendants in statutory interpleader actions. That said, it is clear that the Supreme Court would be empowered to consider the due process rights of the claimant-defendant and determine that interpleader represented an exception to the usual rigorous requirements of personal jurisdiction. However, this is not a determination that should be left to the lower courts. Additionally, the Supreme Court could confirm the assumed connection between pendent personal jurisdiction and section 1367 and the policies therein so as to clearly indicate that pendent and ancillary personal jurisdiction truly are subsumed in section 1367 and that analysis should not differ between the two. Congress could also make the same policy determination and formally approve supplemental personal jurisdiction either under section 1367 or a new, separate statute, as it has with bankruptcy laws. Until that time, however, courts should not exercise personal jurisdiction over individuals who would not ordinarily be amenable to suit before them.